Supreme Court, U.S.
FILED
APR 20 1971
E. ROBERT SEAVER, CLERK

No. 1442

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

CLEMENT A. EVANS & COMPANY, INC.
Petitioner

v.

A. M. KIDDER & COMPANY, INC.,
EDWARD M. GARRETT and WILLIAM J. McALPIN, JR.,
Respondents

Brief on Behalf of Respondent A. M. Kidder & Company, Inc., in Opposition to the Petition for a Writ of Certiorari

To the United States Court of Appeals For the Fifth Circuit

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OF COUNSEL

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PART ONE

STATEMENT OF THE CASE

The statement of the case as set out by the petitioner treats as established fact all of the allegations in his petition. These, of course, were denied and the truth or falsity of these allegations, among other things, were the issues for the jury to pass on, together with the issue as to the use of reasonable care which is the principal matter before the court on this application.

PART TWO

ARGUMENT AND CITATION OF AUTHORITIES

The charge complained of given by the trial court was as follows:

> "Now the defendants also contend that the plaintiff did not exercise reasonable diligence to discover the existence of the alleged fraud. In that connection, I charge you that it is impossible to lay down any general rule as to the amount of evidence or number or nature of evidentual facts admitting discovery of fraud. But, facts in the sense of indisputable proof or any proof at all, are different from facts calculated to excite inquiry which impose a duty of reasonable diligence and which, if pursued, would disclose the fraud. Facts calculated to excite inquiry merely constitute objects of direct experience and, as such, may comprise rumors or vague charges if of sufficient substance to arouse suspicion. Thus, the duty of reasonable diligence is an obligation imposed by law solely under the peculiar circumstances of each case, including existence of a fiduciary relationship, concealment of the fraud, opportunity to detect it, position in the industry, sophistication and expertise in the financial community, and knowledge of related proceedings.
>
> "If you find from the evidence in this case that the plaintiff had knowledge of facts sufficient to excite its inquiry, and that the peculiar circumstances of this case were sufficient to impose upon the plaintiff a duty of reasonable diligence, and that the plaintiff failed to exercise this duty, then you should return a verdict for the defendants."

Petitioners concede that over a three or four month period immediately preceding the checks giving rise to the litigation that checks in substantial amounts had been returned by the bank. Surely, this was sufficient to give rise to the need of inquiry as to the validity of subsequent checks. In 37 C.J.S. Fraud, § 31, on page 276 it is stated:

> "It has been held, however, that one who is aware of suspicious circumstances or has learned of the falsity of one or more misrepresentations is under a legal duty to make a complete investigation and may not

> rely on the representations made; nor may he desist from further investigation because he is reassured of the truth of the original representations by the party suspected of fraud."

In U. S. v. Krueger, 228 Fed. 97, on page 103, it is stated:

> "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."

Petitioners concede that under the law of Georgia this rule prevails. They seek, however, to have the Court apply some other rule. The basis for this is unclear. In general, where a right is created by a federal statute and procedural and evidentuary matters are not spelled out, the District Court will apply the state law of the District in any proceedings thereunder. While this has not been decided with reference to the law of fraud under the Securities Act of 1934 (15 U.S.C.A. 78J (b)) it has been decided with reference to the applicable statute of limitations. In Turner v. Lundquist, 377 Fed. 2nd, 44 (Ninth Circuit 1967), it is stated:

> "Since there is no federal statute of limitations applicable to 15 U.S.C.A. § 78b and 15 U.S.C. § 77q, California's three-year statute (California Code of Civil Procedure, Section 338 (4) is applicable. Errion v. Connell, (9th Cir. 1956), 236 F. 2d 447. . . . Because the alleged fraud occurred in California, and the California statute of limitations applies in this case, we must look to California law to determine when the statute begins to run so as to bar this action."

This same conclusion was reached in Janigan v. Taylor, 344 F. 2d, 781, (First Circuit), and in Dack et al. v. Shanman et al., 227 Fed. Supp. 26, and Osborne v. Mallory, 86 Fed. Supp. 869.

In Sackett v. Beaman, 399 Fed. 2d, 884, 1968, on page 890, it is stated:

> "In such cases, where the action is one at law, such as Sackett proposed in his second amended complaint, it is federal policy to adopt the local law of limitation."

In addition, a standard of conduct is clearly established in Regulation T of the Board of Governors of the Federal Reserve System. Among other provisions of that Regulation is the requirement that a stock broker cease doing business with a customer where, for any reason, a security has been delivered and payment therefor has not been received. In the case of a check, this means that the check itself must have cleared. Under the uncontradicted testimony by an officer of the petitioner, less than thirty days before these particular checks were returned, a check in the amount of $28,725.00 had been returned. Had the petitioner complied with the provisions of Regulation T and "frozen" McAlpin's account for the required ninety day period, these transactions could not have occurred. While this regulation is mandatory it clearly establishes a standard of care which should have governed the petitioner.

CONCLUSION

From the foregoing, it appears clear that the judgment of the Court of Appeals is correct and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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